Supreme Court, U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1971.

No. 71-57

RAYMOND C. AINSWORTH, CHAIRMAN, EDITH Y. SNOW, SECRETARY, AND GERALD F. McCARTHY, MEMBER, AS THEY COMPRISE THE SCHOOL COMMITTEE OF THE TOWN OF LEYDEN,

Petitioners,

v.

NEIL V. SULLIVAN, AS HE IS COMMISSIONER OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners Raymond C. Ainsworth, Edith Y. Snow and Gerald F. McCarthy, as they comprise the School Committee of the Town of Leyden (hereinafter School Committee), pray that a writ of certiorari issue to review the final decree of the Superior Court of the Commonwealth of Massachusetts entered in subject case on April 5, 1971, as ordered

by an opinion of the Supreme Judicial Court of Massachusetts by rescript of March 2, 1971.

References to Reports of Opinions Below.

The opinion of the Superior Court entered and dated on March 31, 1970 is printed in the appendix filed herewith (A. 23).

The opinion of the Supreme Judicial Court dated and entered by rescript of March 2, 1971, appears in the appendix at pages 37-41 and is reported at Mass. Adv. Sh. (1971) 263, 267 N.E. 2d 226.

Jurisdiction.

The decree of the Superior Court was entered on April 5, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented.

1. Do the children enrolled in the public school system of the Town of Leyden enjoy the same constitutional rights to freedom of assembly, freedom of speech and freedom of religion as do other citizens of the United States of America.

2. Do the school teachers employed by the School Committee enjoy the same constitutional rights to freedom of assembly, freedom of speech and freedom of religion as do other citizens of the United States of America?

3. May the School Committee recognize the constitutional rights of such school children and such school teachers as may wish to do so voluntarily to assemble in the school building prior to commencement of the official school day for the purpose of exercising their freedom of religion

and speech in an unsupervised manner of their own choosing?

4. Is the resolution adopted by vote of the School Committee on August 21, 1969, valid and lawful.

5. Do the holdings of this Court proscribing specifically prescribed voluntary prayers extend to the non-prescribed voluntary exercise of religion.

6. Has this Court banned voluntary prayer from the public schools of our nation under any and all circumstances?

Constitutional Provisions Invoked.

The First Amendment to the Constitution of the United States of America, as extended to the States by the Fourteenth Amendment, contains the law applicable to the issues.

Article I is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article XIV, Section I, reads in part as follows:

> "... No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States...."

Statement of the Case.

On August 21, 1969, petitioners adopted the following resolution:

"On each school day, before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to participate voluntarily in the free exercise of religion as guaranteed by our United States Constitution.

"This freedom of religion shall not be expressed in any way that will interfere with another's rights.

"Participation may be total or partial, regular or occasional, or not at all.

"Non-participation shall not be considered evidence of non-religion nor shall participation be considered evidence of recognizing an establishment of religion.

"The purpose of this motion is not to favor one religion over another nor to favor religion over non-religion, but rather to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility; to contribute to the general welfare of the community and to preserve the values that constitute our American heritage."

On January 27, 1970, respondent filed a bill of complaint for declaratory and injunctive relief with the Superior Court seeking a binding declaration that petitioners' resolution is invalid and unlawful under the First Amendment of the Constitution of the United States.

The case was submitted on a statement of agreed facts (A. 20), and on March 31, 1970, the Superior Court entered its finding, rulings and order (A. 23) holding that petitioners' vote was valid and lawful insofar as the children were concerned, but that it was invalid and unlawful as to the teachers.

Petitioners appealed to the Supreme Judicial Court to secure the rights of the teachers, and respondent appealed to deny the rights of the children as recognized by the Superior Court.

The Supreme Judicial Court declared on March 2, 1971 (A. 29) that petitioners' resolution was invalid and unlawful as to both the children and the teachers. Accordingly, the Superior Court entered a final decree after rescript (A. 31) and it is this decree that petitioners here seek to have reviewed.

The stage in the proceedings in the court of first instance in which the federal issues sought to be reviewed were first raised was in the initial pleadings.

Respondent's complaint, prayer 3 (A. 17), alleged that petitioners' vote violated the First Amendment of the United States Constitution. Petitioners' answer, paragraphs 9 and 10 (A. 19), relies upon the First and Fourteenth Articles of Amendment of the Constitution specifying "the constitutionally guaranteed civil rights of free assembly, free speech and freedom of religion . . ."

Similarly, these constitutional issues were timely and properly raised by both parties in their initial briefs and in oral argument to the Supreme Judicial Court.

Both the Superior Court and the Supreme Judicial Court based their opinions on a construction of the Constitution of the United States.

Reasons for Allowance of Writ.

Sound judicial discretion based on special and important reasons is the yardstick set by this Court for granting review on writ of certiorari. *Rules of the Supreme Court of the United States, Rule 19.1.*

Rule 19.1 (a) of this Court indicates that consideration will be given "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

In the instant case the state court has decided a federal question of substance not theretofore determined by this Court. In fact, the Supreme Judicial Court of Massachusetts, in its opinion reversing the decree of the Superior Court, observed twice in its conclusion that its decision related to a matter not yet determined by this Court, as follows:

> "*The Supreme Court thus far has not limited* the broad language with which . . . it has held invalid substantially nondenominational and neutral religious observances on public school property. *Until and unless such a limitation takes place* . . . it would serve no useful purpose to attempt to draw any fine distinction between those observances which have hitherto been proscribed by the Supreme Court and the Leyden practices now presented for our scrutiny." (Emphasis supplied.) (A. 41.) Mass. Adv. Sh. (1971) 263, 266.

Moreover, by refusing to draw any distinctions, fine or otherwise, the Supreme Judicial Court ignored the substantial federal issues raised by both parties in brief and argument below, and based its decision principally upon two prior decisions of this Court clearly factually and legally distinguishable from the instant case. These distinguishable cases are *Engel* v. *Vitale,* 370 U.S. 421, and *School District of Abington Township, Pa.* v. *Schempp* and its companion case of *Murray* v. *Curlett,* 374 U.S. 203.

Engel, Schempp and *Murray* are also analogous to *State Board of Education* v. *Board of Education of Netcong,* 57 N.J. 172, cert. den. April 5, 1971, 28 L. Ed. 2d 550. These four cases raised the same issue, namely, does voluntary, prescribed prayer violate the First Amendment provision that "Congress shall make no law respecting an establishment of religion. . . ." Inasmuch as the first three cases

clearly ruled in the affirmative on this issue and the latter did not raise any new federal issue and was denied certiorari, these cases may be considered similar to each other, but they differ in one essential aspect from the instant case.

An analysis of the facts in *Engel, Schempp, Murray* and *Netcong* will show their similarity and will make manifest their basic difference from the Leyden resolution and practices under it here in issue.

Engel, the initial "prayer" case decided by this Court, was decided on these facts:

The State Board of Regents drafted an official, non-denominational prayer which it recommended be said in all public schools. The New Hyde Park School District directed its principal to cause this official prayer to be read at the beginning of each school day in the presence of a teacher. Pupils could be excused from participation upon request of a parent.

Engel was decided on the limited holding that the Establishment Clause was violated as ". . . it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government" (p. 425). That is the essence of the *Engel* holding. The Court further held "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . ." (p. 430).

The instant case differs factually from *Engel* in essential aspects. Unlike *Engel,* the petitioners did not draft an official prayer, nor did they direct their principal to do anything whatsoever in relation to the free exercise of religion. The petitioners provided that the period for the free exercise be before the commencement of the school day, not at its beginning as in *Engel.* Again unlike *Engel,* the petitioners did not require the presence of a teacher. Un-

like *Engel,* pupils are not excused upon request, but voluntarily appear early (A. 24).

Applying the holding of *Engel* to the facts in the Leyden situation, it is inescapably clear that there is nothing done by petitioners which violates the Establishment Clause. The language from page 430 of *Engel* takes on added significance with the further quotation ". . . as it might from the Free Exercise Clause." The combined language reads:

> "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the sudents is voluntary can serve to free it from the limitations of the Establishment Clause, *as it might from the Free Exercise Clause,* of the First Amendment . . ." (Emphasis supplied.)

Thus the Supreme Court recognizes that so long as public prayer does not violate the Establishment Clause, it may be permissible under the Free Exercise Clause, based on the particular facts.

The next "prayer" cases decided by the Supreme Court were the companion cases of *School District of Abington Township, Pa.* v. *Schempp* and *Murray* v. *Curlett,* 374 U.S. 203 (1963), 10 L. Ed. 2d 844.

The former was based on the validity of a Pennsylvania statute requiring Bible reading and recitation of the Lord's Prayer and the latter on a vote of the Baltimore Board of School Commissioners to the same effect. In both cases, these prescribed prayers were a part of the school curriculum, held under the supervision of teachers. Upon parental request, pupils could be excluded.

Schempp and *Murray* were decided on the limited holding that the state, by prescribing specific prayers, had violated the Establishment Clause. Moreover, unlike *Engel,* the state in *Schempp* and *Murray* prescribed prayers of a particular

religion, thereby also violating the Free Exercise Clause.

Again, *Schempp* and *Murray* differ factually from the facts in the instant case. The petitioner Leyden officials did not provide for Bible reading or recitation of the Lord's Prayer; they did not relate their provision for a period for the free exercise of religion to the school curriculum, but rather provided that it must not be a part of the curriculum as it had to terminate prior to the official commencement of school; they did not require supervision by the teacher, but rather stressed that there be no supervision; and lastly, they did not provide for participants to be excused, but rather provided that those who wished to gather early before school on a voluntary basis could do so (A. 21-23).

In *Netcong,* the local board of education adopted *verbatim* the resolution which the Leyden School Committee had adopted. But, unlike Leyden, the *Netcong* board's vote was implemented by the provision that "the free exercise of religion" take the form of reading from the Congressional Record the prayers by chaplains. Thus the *Netcong* resolution, valid by itself, was converted by implementation of school authorities, into a prescribed, voluntary prayer situation similar to *Engel, Schempp* and *Murray.*

In Leyden, the resolution stands as voted, without any implementation whatsoever by school authorities. Those who take the opportunity to assemble voluntarily before school are free to exercise religion in their own way, without prescription or supervision.

In *Reed* v. *Van Hoven,* 237 F. Supp. 48 (W.D. Mich. S.D. 1965) the District Court permitted public school children, on an interim trial basis, to pray in classrooms, other than their homerooms, before the start of school but enjoined the ringing of school bells to signal the start of the prayer period. It does not appear that the court's ruling has since been modified or appealed. The court so acted out of the

conviction that its suggested procedure was a justifiable accommodation between the Establishment and Free Exercise clauses of the First Amendment.

The court said in part (p. 57):

> "The Engel and Schempp cases, supra, were decided on the basis of the establishment clause of the First Amendment. The accommodation suggested in this opinion is an attempt to avoid the nexus between official authority and religion which constitutes a violation of the establishment clause."

The resolution voted by the School Committee states its legislative purpose thus:

> ".... to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility; to contribute to the general welfare of the community and to preserve the values that constitute our American heritage."

Mere recitation of a valid public purpose in either *Engel* or *Schempp* would have been insufficient to make their votes valid under the Establishment Clause because they clearly violate it by either requiring a state-drafted prayer or by requiring reading from the Bible and recitation of the Lord's Prayer as a supervised part of the school curriculum. But, as in the instant case, where there is no state-drafted prayer, no required Bible reading or prescribed praying of any type, no supervision and no curriculum association, then the stated valid legislative purpose must be recognized, absent evidence to the contrary.

No accommodation of any type has been made to permit the voluntary pre-school, free exercise of religion to occur.

Neither the school bus schedule, the schedule of ringing bells, the time of opening the school building nor the time

of free access to it has been changed in any way as a result of respondents' vote authorizing use of the school building for the voluntary, pre-school, free exercise of religion (A. 22).

As a consequence, not a penny of the taxpayers' money has been spent, directly or indirectly, as a result of petitioners' vote.

Zorach v. *Clauson*, 343 U.S. 306, held it was permissible for schools to "accommodate their schedules to a program of outside religious instruction" (p. 315). If this has neither the purpose nor primary effect of aiding religion, then how can it be held that merely permitting the free exercise of religion without accommodating any schedule, as in Leyden, does so?

Involvement of public property is, at most, dismissed under the doctrine of *de minimus non curat lex.* ...

Examples of cooperation and accommodation between church and state in use of their respective buildings for both public and religious purposes, such as voting in churches and holding religious services in public buildings, are commonplace.

The free exercise of religion voluntarily entered into before school in Leyden is consistent with our American heritage and a bulwark for its continuance.

1. Any student of European history and early American history knows that the purpose of the First Amendment was to prevent the establishment of an official state religion, not to prevent or thwart religion in any way. (See Guest Editorial, A.B.A. Journal, August, 1969, pp. 748, 749, in which retired Nebraska Chief Justice Robert G. Simmons summarizes this succinctly.)

2. "We are a religious people whose institutions presuppose a Supreme Being" said Mr. Justice William O. Douglas in *Zorach*, p. 313.

3. The first European settlement on American shores was named after the great Christian scholar, Saint Augustine.

4. The first written constitution, prepared aboard the Mayflower in 1620, started with the words "In the name of God . . ." and ended with the words ". . . in the presence of God."

5. The Declaration of Independence of July 4, 1776, makes four references to God, the most famous of which is that all men ". . . are endowed by their Creator with certain unalienable rights . . ."

6. The Northwest Ordinance of July 13, 1787, stated "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

7. The great seal of the United States, which appears on every dollar bill, was adopted on June 20, 1782. It depicts the "Eye of God" above a pyramid and carried the legend "He has favored our undertakings."

8. The oath of office of public officials and the oath taken by witnesses concludes with the words "So help me God."

9. In proclaiming of first Thanksgiving Day as a Republic, George Washington said "Whereas it is the duty of all nations to acknowledge the Providence of Almighty God . . . I do recognize and assign Thursday, the 26th of November next, to be devoted by the people of these states to the service of that great and glorious Being who is the beneficent Author of all the good that was, that is or will be."

10. Our National Anthem ends with the words "And this is our motto . . . In God is our trust."

11. Since 1863 our coins have born the motto "In God We Trust." The same words appear on our paper currency.

12. On July 9, 1776, General George Washington issued an order implementing the vote of the Continental Congress providing for chaplains for each regiment, stating "The

blessings and protection of Heaven are at all times necessary, but especially so in times of public distress and danger."

13. We now have chaplains in all branches of our military services, each House of Congress has a chaplain, as do the several state legislatures.

14. Every president from Washington to Nixon has publicly called upon God to bestow blessings upon his administration.

15. Our public monuments throughout the land carry spiritual inscriptions. The Tomb of the Unknown Soldier reads "Here lies in honored glory an American soldier, known but to God." The Lincoln Memorial carries the words of the Gettysburg Address ". . . that this nation under God shall have a new birth of freedom." The Jefferson Memorial reads "God who gave us life gave us liberty. Can the liberties of a nation be secure when we have removed the conviction that these liberties are the gift of God?"

16. Courts throughout our nation open and close with the prayer that God save the nation or state "and this honorable Court."

17. Lest one conclude that our religious heritage is a relic of the past with no current basis, it is significant to note that on June 14, 1954, a joint resolution of Congress added the words "under God" to the pledge of allegiance to the flag of the United States of America. Again, on July 20, 1956, Congress adopted another joint resolution establishing as our official national motto the words "In God We Trust."

This Court as recently as last year has considered by penetrating analysis the relationship of church and state, and by its analysis has given, if not a new, a clear perspective to this complex relationship. In *Walz* v. *Tax Commissioner of the City of New York*, 397 U.S. 664, 25 L. Ed. 2d

697, decided May 4, 1970, this Court confirmed the validity of the practice by which states granted tax exemptions to religious institutions.

Mr. Chief Justice Burger's opinion, applicable to the issue here, stated:

> "... The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." (p. 669.)

Conclusion.

For the foregoing reasons and for the reason that the lack of a clearcut determination by this Court, to the effect that voluntary unprescribed pre-school prayer is valid, has caused needless deprivation of constitutional rights by state authorities misconstruing and misapplying inapplicable holdings of this Court, this petition for a writ of certiorari should be allowed.

Respectfully submitted,

RALPH WARREN SULLIVAN,
Counsel for Petitioner.

Of Counsel:

JAMES M. MALLOY,
RICHARD A. SULLIVAN,
MALLOY, SULLIVAN & SULLIVAN.

Appendix A.

RECORD OF THE SUPERIOR COURT OF MASSACHUSETTS.

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT.

Suffolk, ss. No. 91101 Eq.

NEIL V. SULLIVAN,
as he is Commissioner of Education of
the Commonwealth of Massachusetts,
Petitioner,

v.

RAYMOND C. AINSWORTH, Chairman,
EDITH Y. SNOW, Secretary, and
GERALD F. MCCARTHY, Member, as they comprise
the School Committee of the Town of Leyden,
Respondents

Bill of Complaint for Declaratory and Injunctive Relief.

To the Honorable, the Justices of the Superior Court sitting in and for the County of Suffolk:

1. Your petitioner, Neil V. Sullivan, is the duly appointed and qualified Commissioner of Education, having his office in Boston, within the County of Suffolk.

2. The respondents, Raymond C. Ainsworth, Edith Y. Snow, and Gerald F. McCarthy; are, respectively, the Chairman, Secretary and Member of the School Committee of the

Town of Leyden, and are residents of the Town of Leyden, within the County of Franklin.

3. This is a bill of complaint for declaratory and injunctive relief filed pursuant to the provisions of General Laws, chapter 231A, seeking a binding declaration of the rights and duties of the respondents, as they comprise the School Committee of the Town of Leyden, with respect to the practice of Bible reading and prayer conducted in an elementary school of the Town of Leyden, and seeking preliminary and permanent injunctive relief against the continuation of said practice.

4. On August 21, 1969, respondents passed a motion which stated:

> "On each school day, before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to to participate voluntarily in the free exercise of religion as guaranteed by our United States Constitution.
>
> "This freedom of religion shall not be expressed in any way that will interfere with another's rights.
>
> "Participation may be total or partial, regular or occasional, or not at all.
>
> "Non-participation shall not be considered evidence of non-religion nor shall participation be considered evidence of recognizing an establishment of religion.
>
> "The purpose of this motion is not to favor one religion over another nor to favor religion over non-religion, but rather to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility; to contribute to the general welfare of the community and to preserve the values that constitute our American heritage."

5. Since the commencement of the school year and continuing until the present, respondents have implemented their motion in the Leyden Elementary School in the following or substantially similar manner: At 8:35 a.m., a school bell rings to indicate that it is time for the pupils to gather for prayer. At 8:40 a.m., another bell rings signalling the commencement of the exercise. At this time different practices occur in grades one through six. Either the Bible is read by the teacher or by a volunteer chosen by the teacher, or else the Lord's Prayer is recited under the teacher's supervision. Student have been advised that they may participate or not in these exercises. Immediately following this five-minute period, another school bell rings at 8:45 a.m. and the "regular" school day begins with a flag salute, a patriotic song, and silent meditation.

6. The practices referred to in paragraph 5, *supra*, which take place as a result of the motion passed by respondents referred to in paragraph 4, *supra*, are unconstitutional under the First Amendment of the Constitution of the United States.

WHEREFORE, your petitioner prays:

1. That, after notice and hearing, a preliminary injunction issue restraining the respondents, their agents and employees, pending final determination of this suit, from implementing their aforesaid motion of August 21, 1969, and from permitting or allowing Bible reading or prayer in the public schools of the Town of Leyden.

2. That, after notice and hearing, this Court order speedy completion of the pleadings.

3. That a binding declaration be made that Bible reading and prayer conducted in the manner referred to in paragraph 5 of this bill or in a substantially similar manner is unconstitutional under the First Amendment of the Constitution

of the United States, and that the motion of respondents referred to in paragraph 4 of this bill is invalid and unlawful.

4. That a permanent injunction issue permanently restraining the respondents, their agents and employees from further implementing their motion of August 21, 1969 or from permitting or allowing Bible reading or prayer in the public schools of the Town of Leyden

5. For such other further relief as to this Court may seem just and proper.

NEIL V. SULLIVAN
Commissioner of Education

VERIFICATION.

SUFFOLK, ss. January 26, 1970

Then personally appeared NEIL V. SULLIVAN and made oath that he has read the foregoing bill by him subscribed and that the statements contained therein are true to the best of his knowledge and belief, and that as to those statements that are based on information and belief, he believes them to be true.

WALTER H. MAYO III
Notary Public [SEAL]
Commonwealth of Massachusetts
My commission expires May 29, 1975

Filed January 27, 1970.

Respondents' Answer.

1. Respondents admit the allegations contained in paragraph numbered 1 of petitioner's Bill of Complaint.

2. Respondents admit the allegations contained in paragraph 2 of petitioner's Bill of Complaint.

3. Respondents deny the allegations contained in paragraph numbered 3 of petitioner's Bill of Complaint insofar as they allege that there is a "practice of Bible reading and prayer conducted" in the Leyden Elementary School.

4. Respondents admit the allegations contained in paragraph numbered 4 of petitioner's Bill of Complaint.

5. Respondents deny each and every allegation in paragraph numbered 5 of petitioner's Bill of Complaint, except they admit that during the voluntary, pre-school, unsupervised free exercise of religion that "different practices occur in grades one through six", and they admit that "students have been advised that they may participate or not."

6. Respondents deny the allegations contained in paragraph numbered 6 of petitioner's Bill of Complaint.

7. As to prayer paragraph numbered 1, which the Court has taken under advisement, respondents oppose granting of a preliminary injunction on the grounds that the practices complained of are constitutional and no irreparable injury can occur from their continuance.

8. The Court has acted on prayer paragraph numbered 2.

9. Respondents oppose prayer paragraph numbered 3 in that the First Amendment to the Constitution of the United States as extended by the Fourteenth Amendment guarantees the free exercise of religion, and respondents' vote of August 21, 1969 is valid and lawful.

10. Respondents oppose prayer paragraph numbered 4 as it would deny constitutionally guaranteed civil rights of free assembly, free speech and freedom of religion to the persons enrolled as students or employed as teachers in Leyden, and it would constitute the prevention of the free exercise of religion specifically guaranteed by the First Amendment.

11. Respondents pray that the Court issue a binding declaration that the vote of respondents adopted on August

21, 1969 is valid and lawful and that the voluntary, unsupervised, pre-school free exercise of religion is constitutional.

Respectfully submitted,

RAYMOND C. AINSWORTH, Chairman,
EDITH Y. SNOW, Secretary and
GERALD F. MCCARTHY, Member,
LEYDEN SCHOOL COMMITTEE

By their attorney,
RALPH WARREN SULLIVAN

MALLOY, SULLIVAN & SULLIVAN
Filed February 18, 1970

Statement of Agreed Facts.

It is agreed by and between the parties hereto that the following is a statement of all the facts on which the rights of the parties are to be determined, and that the above-entitled case is to be submitted to the Court thereon as a case stated, subject to the admission of any evidence as may be requested by the Court. The parties, and each of them, reserve the right to argue that any fact herein contained, although true, is neither material nor relevant to any issue.

1. The petitioner, Neil V. Sullivan, is the duly appointed and qualified Commissioner of Education, having his office in Boston, within the County of Suffolk.

2. The respondents, Raymond C. Ainsworth, Edith Y. Snow, and Gerald F. McCarthy, are, respectively, the Chairman, Secretary and Member of the School Committee of the Town of Leyden, and are residents of the Town of Leyden, within the County of Franklin.

3. On August 21, 1969, respondents voted a motion which stated:

"On each school day, before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to to participate voluntarily in the free exercise of religion as guaranteed by our United States Constitution.

"This freedom of religion shall not be expressed in any way which will interfere with another's rights.

"Participation may be total or partial, regular or occasional, or not at all.

"Non-participation shall not be considered evidence of non-religion nor shall participation be considered evidence of recognizing an establishment of religion.

"The purpose of this motion is not to favor one religion over another nor to favor religion over non-religion, but rather to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility; to contribute to the general welfare of the community and to preserve the values that constitute our American heritage."

4. On September 2, 1969, the day before the Leyden Elementary School opened, respondents met with teachers of the school, namely, Mrs. Rhodes (principal of the school and teacher of the combined fifth and sixth grade classes), Mrs. Tooley (teacher of the combined third and fourth grade classes), Mrs. Finch (teacher of the combined first and second grade classes), and Mrs. Hall (teacher of kindergarten class).

5. On the above date, respondents gave the teachers copies of the motion voted on August 21, 1969 and advised the teachers that they could participate or not as they desired; that participation or non-participation was a matter

of indifference to the school committee, and that if they participated they would do so in their capacity as private citizens and not in their capacity as teachers.

6. Respondents further advised the teachers that they were to give similar information to all children and to stress that neither the school committee, nor the teachers nor the students were to consider attendance or non-attendance either favorably or unfavorably.

7. Respondents further advised that whatever activity, if any, that occurred under this vote would have to end before 8:45 a.m. The respondents designate 8:45 as the official commencement of the school day.

8. Respondents have not modified the motion voted on August 21, 1969. Since their advice of September 2, 1969, they have not communicated further with the teachers concerning this matter.

9. The following is essentially what has occurred at the Leyden Elementary School from September 3, 1969 to the date of the filing of this statement:

(a) The first school bus arrives at about 8:10 a.m., and the other two buses arrive between 8:30 and 8:45 a.m. When the children (approximately 80 in number) arrive at the school, some play outdoors and some come in early and talk, hang their coats, read or otherwise occupy their time.

(b) At 8:40 a.m. a bell is rung, signalling that school will start in five minutes.

(c) During the five minutes immediately prior to the 8:45 a.m. bell, some form of prayer or spiritual expression takes place in each of the classrooms. There is no uniformity either as to time or performance, but the average duration is two to three minutes. Generally one of the children or one of the teachers takes the initiative to read from one of the Bibles, anthologies or other inspirational texts (some are owned by the Town, some by the teachers and some by

the children). On some occasions prayers, traditional (such as the Lord's Prayer) or innovative, are said or read aloud.

(d) Sometimes all of those who have gathered early join in and at other times others just listen. At one time or another all of the children have participated to some extent, and those who do not, on the occasions that they do not, either play outside or remain in the lobby or library areas of the school.

(e) The teachers are not necessarily in their own rooms during the entire five minutes before 8:45 a.m., but generally they are and generally they do participate to a varying extent.

10. The motion voted on August 21, 1969 has not caused any change in the schedule of the school buses, the time of the opening of and free access to the school building, or the practice of sounding school bells.

For the petitioner,
WILLIAM E. SEARSON, III
Assistant Attorney General

For the respondents,
RALPH W. SULLIVAN

February 23, 1970, Filed.
Attest: MARY G. MURPHY
Ass't. Clerk

Findings, Rulings and Order.

This was a bill of complaint for declaratory and injunctive relief brought by the Commissioner of Education of the Commonwealth of Massachusetts against the persons comprising the School Committee of the Town of Leyden in the matter of "exercise of religion" at the Leyden Elementary School.

The case was heard on a statement of agreed facts, a copy of which is attached hereto. This statement, rather than

the petitioner's allegations in his bill of complaint or the answer of the respondents, is, of course, the basis of the Court's decision.

Among other matters, the Court notes in the said statement that the motion voted by the School Committee does not require, prescribe or advise use of a permitted period of five minutes before class instruction begins. It is also noted that the participation of the students is entirely voluntary and that no procedure for being excused from the exercise is necessary. It is further noted that the voting of the motion has not caused any change "in the time of the opening of and free access to the school building or the practice of sounding school bells". As it previously has, a bell at 8:40 A.M. signals that school will start at 8:45 A.M. A period of not more than five minutes immediately before the commencement of the school day is "available" to those who may wish to participate. Just as before the vote, students have access to the school building during said period.

Essentially, what the motion does is to state that the "free exercise of religion" is not forbidden in the school during the brief period before the school day officially begins. Over and above the purposes stated in the vote, it appears to the Court that the motion has the purpose and primary effect of showing appreciation for and sensitivity to the rights of citizens to the free exercise of religion in ways that will not interfere with another's rights and will not contravene or disregard the decisions of the United States Supreme Court.

The statement of agreed facts indicates that the School Committee has been circumspect and careful not to infringe upon the rights of anyone and to take a position which is neither hostile nor favorable to religion and religious activity.

The fact that during the five minutes immediately prior to the 8:45 A.M. bell (the designated official commencement of

the school day) "some form of prayer or spiritual expression takes place in each of the classrooms" does not offend against the establishment clause of the First Amendment to the Constitution as applied to the states by the Fourteenth Amendment. The fact that during said period one of the children takes the initiative to read from a Bible, an anthology or other spiritual text or, on occasion, that prayers, traditional or innovative, are said or read aloud, does not in the Court's view offend against the United States Supreme Court decisions or the First Amendment to the United States Constitution.

The authorization of participation by the teachers in the aforementioned "exercise of religion" by the vote of the respondents does, however, in the Court's opinion, violate the First Amendment. It is unrealistic to suggest that teachers are in the school buildings immediately before the start of the school day in their capacity as private citizens rather than as school teachers hired by the town. It also is unrealistic to suppose that the teachers, if they participate, would not tend to direct the activities which take place in the five minute period.

The Court declares that the motion voted by the respondents, in the circumstances disclosed by the agreed statement of facts, is lawful and valid insofar as participation by students alone is concerned, but is objectionable constitutionally insofar as participation by teachers with the students is concerned.

In accordance with this declaration, an appropriate decree may be entered.

PAUL V. RUTLEDGE
Justice of the Superior Court

(The copy of the Statement of Agreed Facts attached hereto has been omitted. A copy appears earlier.)

Entered: March 31, 1970

Petitioner's Request for a Report of the Material Facts.

The petitioner Neil V. Sullivan requests the Court pursuant to G. L. c. 214, § 23 to report the material facts found by it.

By his attorney,
WILLIAM E. SEARSON, III
Assistant Attorney General

Filed June 1, 1970

Report of Material Facts.

Request for Report of Material Facts having been filed in the above entitled case, the Court hereby adopts as such report the findings in "FINDINGS, RULINGS and ORDER FOR DECREE," including Statement of Agreed Facts, entered March 31, 1970.

PAUL V. RUTLEDGE
Justice of the Superior Court

Entered: June 5, 1970

Final Decree.

This cause came on to be heard at this session upon a statement of agreed facts, and thereupon, after hearing and argument of counsel, it is hereby ORDERED, ADJUDGED and DECREED that:

1. The motion voted by respondents on August 21, 1969, in the circumstances disclosed by the statement of agreed facts, is lawful and valid insofar as participation by students alone is concerned, but is objectionable constitutionally insofar as participation by teachers with the students is concerned.

2. The respondents, their agents and employees are hereby permanently enjoined and restrained from permitting participation in school by teachers with the students in the latters' "exercise of religion" as authorized by respondents' vote of August 21, 1969.

By the Court,
PAUL V. RUTLEDGE, J.

We assent to the form of this Decree:
RALPH WARREN SULLIVAN
RALPH WARREN SULLIVAN
Attorney for Respondents

WILLIAM E. SEARSON, III
WILLIAM E. SEARSON, III
Assistant Attorney General
Attorney for Petitioner

Entered: May 28, 1970

Petitioner's Claim of Appeal.

The petitioner, being aggrieved by the Final Decree entered in this cause on May 28, 1970, by Mr. Justice Paul V. Rutledge of the Superior Court, appeals therefrom to the Supreme Judicial Court.

For the petitioner,
WILLIAM E. SEARSON, III
Assistant Attorney General

Filed June 12, 1970

Respondents' Claim of Appeal.

The respondents, being aggrieved in part by the Final Decree entered in this cause on May 28, 1970, by Mr. Justice Paul V. Rutledge of the Superior Court, appeals therefrom to the Supreme Judicial Court.

For the respondents,
RALPH WARREN SULLIVAN

MALLOY, SULLIVAN & SULLIVAN
Filed June 16, 1970
Copy,
Attest:

ROBERT J. DORGAN,
Clerk.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON.

March 2, 1971

Rescript.

IN THE CASE OF

COMMISSIONER OF EDUCATION
vs.
SCHOOL COMMITTEE OF LEYDEN

pending in the Superior
Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

Final decree is reversed. A new decree is to be entered in accordance with the opinion.

By the Court,
/s/ FREDERICK J. QUINLAN,
Clerk.

March 2, 1971

Appendix C.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT

EQ. No. 91101

NEIL V. SULLIVAN,
Commissioner of Education of the
Commonwealth of Massachusetts

v.

RAYMOND C. AINSWORTH,
Chairman, et als, as they are members of the
School Committee of the Town of Leyden.

Final Decree after Rescript.

This cause came to be further heard upon the rescript of the Supreme Judicial Court, and thereupon, on consideration thereof, it is ORDERED, ADJUDGED and DECREED that:

1. The resolution voted by the respondents on August 21, 1969, is unlawful and therefore null and void.

2. The respondents, their agents and employees are hereby permanently enjoined and restrained from allowing students or teachers to participate in the observances described in the statement of agreed facts (which statement is annexed hereto), or in substantially similar observances, while they are on school property.

By the Court,
PAUL V. RUTLEDGE
Justice of the Superior Court

Entered: April 5, 1971

STATEMENT OF AGREED FACTS.

It is agreed by and between the parties hereto that the following is a statement of all the facts on which the rights of the parties are to be determined, and that the above-entitled case is to be submitted to the Court thereon as a case stated, subject to the admission of any evidence as may be requested by the Court. The parties, and each of them, reserve the right to argue that any fact herein contained, although true, is neither material nor relevant to any issue.

1. The petitioner, Neil V. Sullivan, is the duly appointed and qualified Commissioner of Education, having his office in Boston, within the County of Suffolk.

2. The respondents, Raymond C. Ainsworth, Edith Y. Snow, and Gerald F. McCarthy, are, respectively, the Chairman, Secretary and Member of the School Committee of the Town of Leyden, and are residents of the Town of Leyden, within the County of Franklin.

3. On August 21, 1969, respondents voted a motion which stated:

> "On each school day, before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to participate voluntarily in the free exercise of religion as guaranteed by our United States Constitution.
>
> "This freedom of religion shall not be expressed in any way which will interfere with another's rights.
>
> "Participation may be total or partial, regular or occasional, or not at all.
>
> "Non-participation shall not be considered evidence of non-religion nor shall participation be considered evidence of recognizing an establishment of religion.
>
> "The purpose of this motion is not to favor one religion over another nor to favor religion over non-religion, but rather to promote love of neighbor,

brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility; to contribute to the general welfare of the community and to preserve the values that constitute our American heritage."

4. On September 2, 1969, the day before the Leyden Elementary School opened, respondents met with the teachers of the school, namely, Mrs. Rhodes (principal of the school and teacher of the combined fifth and sixth grade classes), Mrs. Tooley (teacher of the combined third and fourth grade classes), Mrs. Finch (teacher of the combined first and second grade classes), and Mrs. Hall (teacher of kindergarten class).

5. On the above date, respondents gave the teachers copies of the motion voted on August 21, 1969 and advised the teachers that they could participate or not as they desired; that participation or non-participation was a matter of indifference to the school committee, and that if they participated they would do so in their capacity as private citizens and not in their capacity as teachers.

6. Respondents further advised the teachers that they were to give similar information to all children and to stress that neither the school committee, nor the teachers nor the students were to consider attendance or non-attendance either favorably or unfavorably.

7. Respondents further advised that whatever activity, if any, that occurred under this vote would have to end before 8:45 a.m. The respondents designate 8:45 a.m. as the official commencement of the school day.

8. Respondents have not modified the motion voted on August 21, 1969. Since their advice of September 2, 1969, they have not communicated further with the teachers concerning this matter.

9. The following is essentially what has occurred at the Leyden Elementary School from September 3, 1969 to the date of the filing of this statement:

(a) The first school bus arrives at about 8:10 a.m., and the other two buses arrive between 8:30 and 8:45 a.m. When the children (approximately 80 in number) arrive at the school, some play outdoors and some come in early and talk, hang their coats, read or otherwise occupy their time.

(b) At 8:40 a.m. a bell is rung, signalling that school will start in five minutes.

(c) During the five minutes immediately prior to the 8:45 a.m. bell, some form of prayer or spiritual expression takes place in each of the classrooms. There is no uniformity either as to time or performance, but the average duration is two to three minutes. Generally one of the children or one of the teachers takes the initiative to read from one of the Bibles, anthologies, or other inspirational texts (some are owned by the Town, some by the teachers and some by the children). On some occasions, prayers, traditional (such as the Lord's Prayer) or innovative, are said or read aloud.

(d) Sometimes all of those who have gathered early join in and at other times others just listen. At one time or another all of the children have participated to some extent, and those who do not, on the occasions that they do not, either play outside or remain in the lobby or library areas of the school.

(e) The teachers are not necessarily in their own rooms during the entire five minutes before 8:45 a.m., but generally they are and generally they do participate to a varying extent.

10. The motion voted on August 21, 1969 has not caused any change in the schedule of the school buses, the time of the opening of and free access to the school building, or the practice of sounding school bells.

For the petitioner,
WILLIAM E. SEARSON, III
Assistant Attorney General

For the respondents,
RALPH W. SULLIVAN

February 23, 1970, Filed.
Attest: MARY G. MURPHY
Ass't. Clerk

APPENDIX D.

Opinion of the Supreme Judicial Court.

COMMONWEALTH OF MASSACHUSETTS.
COMMISSIONER OF EDUCATION
vs.
SCHOOL COMMITTEE OF LEYDEN.

(Mass. Adv. Sh. (1971) 263, 267 N.E. 201, 226.)

CUTTER, J. The commissioner's bill seeks to enjoin the school committee from putting into effect a resolution adopted on August 21, 1969,[1] and "from permitting . . . Bible reading or prayer in the . . . [Leyden] public schools." The matter is before us on a case stated, summarized below, upon which it is our duty[2] to order the correct decree. See

[1] The resolution, referred to in the record as a "motion," reads, "On each school day, before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to participate voluntarily in the free exercise of religion as guaranteed by our United States Constitution. This freedom of religion shall not be expressed in any way which will interfere with another's rights. Participation may be total or partial, regular or occasional, or not at all. Non-participation shall not be considered evidence of non-religion nor shall participation be considered evidence of recognizing an establishment of religion. The purpose of this . . . [resolution] is not to favor one religion over another nor to favor religion over non-religion, but rather to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness, and civic responsibility; to contribute to the general welfare of the community and to preserve the values that constitute our American heritage."

[2] The trial judge ruled that (in the circumstances described in the case stated) reading by students of the Bible, religious texts, or prayer did not offend against certain recent constitutional decisions of the Supreme Court but that participation by teachers did do so.

Saphier v. *Devonshire St. Fund, Inc.* 352 Mass. 683, 684; *Nasis v. American Motorists Ins. Co.* 353 Mass. 219, 221.

After reciting the resolution (fn. 1) the case stated sets forth that, prior to the opening of school for the academic year 1969-1970, the school committee met with several teachers of the Leyden Elementary School and gave them copies of the resolution. They were told that "they could participate or not as they desired; that participation or non-participation was a matter of indifference to the school committee, and that if they participated they would do so in their capacity as private citizens and not in their capacity as teachers." The teachers were instructed to "give similar information to all children." School was to commence at 8:45 A.M. and "whatever activity, if any, that occurred under" the resolution was to end before 8:45 A.M. There has been no modification of the resolution nor has the school committee "communicated further with the teachers concerning this matter."

Each day one school bus arrives about 8:10 A.M. The other two buses arrive between 8:30 and 8:45.[3] At 8:40 a bell indicates that school will start in five minutes. "During the five minutes immediately prior to the 8:45 a.m. bell, some form of prayer or spiritual expression takes place in each of the classrooms. . . . [T]he average duration is two to three minutes. Generally one of the children or one of the teachers . . . read[s] from one of the Bibles, anthologies or other inspirational texts (some are owned by the [t]own, some by the teachers, and some by the children). On some occasions prayers, traditional (such as the Lord's Prayer) or innovative, are said. . . . [On some occasions] all . . . who have gathered early join in and at other times others just

[3] When the approximately eighty children arrive each morning, some play outdoors and some go inside, talk, "read, or otherwise occupy their time." By the 1965 State Census, the town had a total population of 343.

listen. At one time or another all of the children have participated to some extent, and those who do not, on the occasions that they do not, either play outside or remain in the lobby or library areas of the school. The teachers . . . . [need not be, but usually] are in their own rooms during the entire five minutes before 8:45 . . . and generally they do participate to a varying extent. . . . The . . . [resolution] has not caused any change in the schedule of the school buses, the time of the opening of and free access to the school building, or the practice of sounding school bells."

1. The commissioner, despite the provisions of G. L. c. 71, § 1B, inserted by St. 1970, c. 264,[4] argues that the Leyden resolution, the activities permitted by it, and § 1B are in violation of the Massachusetts Constitution, particularly art. 46, § 2, of the Amendments. There is no occasion to pass upon these contentions. We deal with the matter solely on the basis of decisions of the Supreme Court of the United States considering the application of the Constitution of the United States to generally similar situations. Cf. *Commonwealth* v. *Renfrew*, 332 Mass. 492.

2. Several recent decisions of the Supreme Court of the United States discuss religious exercises and instruction in, or closely related to, the public schools.[5] The most pertinent

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[4] "The school committee of any city or town may permit any child attending its public schools to participate in voluntary prayer with the approval of such child's parents before the commencement of each daily school session. Notwithstanding any provision of law to the contrary, no city or town which permits such prayer shall be denied any funds for school purposes to which it may be entitled from the commonwealth."

[5] See e.g. *Everson* v. *Board of Educ.* 330 U. S. 1, 14-15 (reimbursement of bus transportation for children attending parochial schools); *McCollum* v. *Board of Educ.* 333 U. S. 203, 206, 209 (released time for religious instruction on school property); *Zorach* v. *Clauson*, 343 U. S. 306, 308-309, 312-315 (released time for religious instruction off school premises); *Board of Educ.* v. *Allen*, 392 U. S. 236, 242-249 (State furnishing of free secular textbooks

of these are *Engel* v. *Vitale*, 370 U. S. 421, 422-424, 430 (short nondenominational prayer prescribed by the State Board of Regents violates the Establishment Clause of the First Amendment); *Abington Sch. Dist.* v. *Schempp*, 374 U. S. 203, 222-226 (prescribed reading of Bible and prayer invalid under First Amendment, even if student participation may be excused); *Chamberlain* v. *Dade County Bd. of Pub. Instruction*, 377 U. S. 402 (revg. 160 So. 2d [Fla.] 97); *Stein* v. *Oshinsky*, 348 F. 2d 999, 1001-1002 (2d Cir.-School officials not required to permit voluntary devotional exercises on State-owned property), cert. den. 382 U. S. 957; *DeSpain* v. *DeKalb County Community Sch. Dist.* 384 F. 2d 836, 838-840 (7th Cir.), cert. den. 390 U. S. 906. See *State Bd. of Educ.* v. *Board of Educ. of Netcong*, 57 N. J. 172,[a] affg. 108 N. J. Super. 564, 575-585, in which the court reached a conclusion substantially like the result which we reach.

The school committee's position, in effect, is that the Leyden practices, conducted in a manner consistent with the resolution (fn. 1), are not within the prohibition of the *Schempp* case (374 U. S. 203) because there is no requirement of student or teacher participation, the voluntary exercises are wholly under student control, and there is no prescribed form for the exercises. The exercises, however, are held on school property with school committee per-

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to parochial school children not shown to be otherwise than completely neutral with respect to religion); *Epperson* v. *Arkansas*, 393 U. S. 97, 98-99, 107 (proscription of teaching certain evolution doctrine held invalid); *Walz* v. *Tax Commn.* 397 U. S. 664, 672-680 (local tax exemption of land used for religious purposes valid). See also *Sherbert* v. *Verner*, 374 U. S. 398, 403-410; *Reed* v. *Van Hoven*, 237 F. Supp. 48, 54-57 (W. D. Mich.); Annotation, 45 A. L. R. 2d 742.

[a] Petition for certiorari filed February 3, 1971; see (Feb. 9, 1971) 39 U. S. L. Week 3337.

mission granted by a resolution. Teacher participation (at least without teacher leadership or control) is allowed. It reasonably may be inferred that the resolution was a sincere effort to permit continuance, on a wholly voluntary basis, of what had formerly been required by G. L. c. 71, § 31. That statute was held unconstitutional in *Attorney Gen.* v. *School Comm. of No. Brookfield,* 347 Mass. 775, a result inevitable under the decisions of the Supreme Court of the United States just cited. See *Waite* v. *School Comm. of Newton,* 348 Mass. 767.

The Supreme Court thus far has not limited the broad language with which (as in the *Schempp* case) it has held invalid substantially nondenominational and neutral religious observances on public school property. Until and unless such a limitation takes place (even if there is minimal State encouragement of only insubstantial school religious exercises), it would serve no useful purpose to attempt to draw any fine distinction between those observances which have hitherto been proscribed by the Supreme Court and the Leyden practices now presented for our scrutiny. We think that, under the applicable First Amendment decisions, neither students nor teachers may be allowed to participate in the well-intended observances on school property authorized by the Leyden resolution.

The final decree is reversed. A new decree is to be entered consistent with this opinion.

So ordered.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 2 1971
E. ROBERT SEAVER, CLERK

No. 71-5

In The Supreme Court of The United States

OCTOBER TERM, 1971.

RAYMOND C. AINSWORTH, *Chairman*,
EDITH Y. SNOW, *Secretary*,
and GERALD F. MCCARTHY, *Member*,
as they comprise the School Committee
of the Town of Leyden,
Petitioners

v.

NEIL V. SULLIVAN, as He is *Commissioner of Education*
of the Commonwealth of Massachusetts,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

MEMORANDUM IN OPPOSITION

ROBERT H. QUINN,
Attorney General
WALTER H. MAYO III,
Assistant Attorney General
WILLIAM E. SEARSON III,
Assistant Attorney General
373 State House
Boston, Massachusetts 02133

In The Supreme Court of The United States

OCTOBER TERM, 1971.

No. 71-5

RAYMOND C. AINSWORTH, *Chairman*,
EDITH Y. SNOW, *Secretary*
and GERALD F. MCCARTHY, *Member*,
as they comprise the School Committee
of the Town of Leyden,
Petitioners

v.

NEIL V. SULLIVAN, as He is *Commissioner of Education*
of the Commonwealth of Massachusetts,
Respondent

MEMORANDUM IN OPPOSITION

The petition for a writ of certiorari, which was filed with this Court on July 1, 1971, seeks review of a "final decree after rescript" entered in the Superior Court of Massachusetts (Pet. 31). The decree followed a decision of the Supreme Judicial Court of Massachusetts which determined that an authorization of the respondents permitting bible reading and prayer in the public schools of the Town of Leyden, Massachusetts was constitutionally prohibited (Pet. 37-41).

The decision of the Supreme Judicial Court was filed on March 2, 1971, and, on that same day, the Court entered a rescript which contained its order in the case (Pet. 29). Under Massachusetts local practice, the rescript is also filed with the Superior Court, and there remains only the ministerial act of entering a "Final Decree After Rescript" to terminate the litigation. The petition ostensibly seeks review of that latter decree which was entered on April 5, 1971.

In our view, the petition is clearly out of time, and the Court is not required to consider the petition on its merits.[1] A petition for a writ of certiorari must be filed within ninety days of the "judgment or decree" sought to be reviewed. 28 U.S.C. § 2101. Although petitioners will doubtless argue that the ninety days runs from the entry of the final decree after rescript, this Court has held otherwise. In *Cole* v. *Violette*, 319 U.S. 581, at 582, the Court stated:

> "Massachusetts local practice regards the decree entered by the Superior Court on the rescript, rather than the order of the Supreme Judicial Court contained in the rescript, as the 'final decree' in the case. See *Boston* v. *Santosuosso*, 308 Mass. 189, 194, 31 N.E.2d 564; *Carilli* v. *Hersey*, 303 Mass. 82, 84, 20 N.E.2d 492. But in determining what is a final judgment or decree within the meaning of Section 237 of the Judicial Code, 28 U.S.C. § 344, 28 U.S.C.A. § 344, we are not controlled by the designation applied to it in state practice. *Dept.*

---

[1] In any event, the decision of the Supreme Judicial Court was clearly correct given the governing principles and cases cited by the Court. See Pet. 39-40. There is thus no substantial reason for granting the writ.

of Banking v. *Pink*, 317 U.S. 264, 268, 63 S.Ct. 233, 235, 87 L. Ed. —; *Gorman* v. *Washington University*, 316 U.S. 98, 101, 62 S.Ct. 962, 86 L.Ed. 1300. The order of the Supreme Judicial Court of Massachusetts incorporated in its rescript, was an order of the same nature and with the same incidents as those of the highest courts of other states which we review. It was an order of the court, and one which finally disposed of all the issues in the case, leaving nothing to be done but the ministerial act of entering judgment in the trial court. The appeal is dismissed on the ground that it was not applied for within the time provided by law. *Dept. of Banking* v. *Pink, supra,* and *Matton Steamboat Co.* v. *Murphy, supra.*"

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT H. QUINN,
Attorney General

WALTER H. MAYO III,
Assistant Attorney General

WILLIAM E. SEARSON III,
Assistant Attorney General

Attorneys for Respondent

July 1971